

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 18 September 2003

Case No. 2003-STAA-00006

MARK E. HOWICK,
Complainant,

v.

CAMPBELL-EWALD COMPANY,
Respondent.

RECOMMENDED DECISION AND ORDER - DISMISSAL OF COMPLAINT

This matter arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. This matter is before me on Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor Occupational Safety and Health Administration ("OSHA") after investigation of the complaint. 49 U.S.C. § 31105(b)(2)(A), 29 C.F.R. § 1978.105.

Findings of Fact and Conclusions of Law

Mark Howick ("Complainant") was discharged from his employment with Campbell-Ewald ("Respondent") on or about January 13, 2002. Complainant filed a verbal complaint of discrimination in violation of the STAA with OSHA on or about January 15, 2002. On September 27, 2002, OSHA recommended that Complainant's complaint be dismissed as non meritorious. Complainant filed a "notice of objections to the findings & request for hearing" on October 30, 2002. The undersigned issued a pre-hearing order on November 18, 2002. Following a telephone conference on December 23, 2002, an order and memorandum of telephone conference was issued setting the deadlines for completion of discovery matters and scheduling the hearing for April 29 through May 2, 2003 in Dayton, Ohio. Through a proper notice of deposition, Respondent scheduled the deposition of Complainant for January 29, 2003 in Dayton, Ohio. The parties filed a joint request for the appointment of a settlement judge. Chief Administrative Law Judge John Vittone appointed Administrative Law Judge Daniel J. Roketenetz as the settlement judge on January 17, 2003. Following a conference call on January

24, 2003, an order was issued granting an extension of discovery deadlines and re-scheduling the hearing for June 10 through June 13, 2003. Additionally, the parties agreed that Complainant would answer Employer's interrogatories and requests for production of documents by February 24, 2003. Complainant and Respondent also agreed to reschedule the deposition of Complainant, which had been scheduled for January 29, 2003 in Dayton, Ohio, to March 1, 2003 in Dayton, Ohio.

Edward Slavin, Esq. entered a notice of appearance on behalf of Complainant on January 29, 2003. Additionally, Complainant served his first request for admissions and requested that the settlement judge conference call, which had been scheduled for January 31, 2003, be rescheduled. On February 10, 2003, Complainant faxed a letter to the undersigned entitled "MR. HOWICK'S MOTION FOR A PROTECTIVE ORDER FOR SIMULTANEOUS EXCHANGE OF DISCOVERY RESPONSES." In the letter, counsel for Complainant stated that Complainant had to take three weeks off of work due to his father's hospitalization. Noting that Complainant's responses to Respondent's discovery requests were due on February 24, 2003, Complainant proposed that a simultaneous exchange of discovery responses be set for February 28, 2003 in order to protect Complainant from annoyance, embarrassment, oppression, or undue burden or expense and as a reasonable accommodation of the Howick family pursuant to the Americans with Disabilities Act and *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Sep. 27, 1996). Respondent filed an objection to Complainant's motion for a protective order on February 14, 2003, noting that Complainant had already had his deposition rescheduled from January 29, 2003 to March 1, 2003 and that he had been granted an extension to complete discovery responses from January 24, 2003 to February 24, 2003. On February 14, 2003, the undersigned found no basis to issue a protective order, construed Complainant's motion for a protective order as a motion for extension of time to file answers to interrogatories only, and granted Complainant an extension to complete Respondent's interrogatories and request for production of documents until February 26, 2003 due to an illness in Complainant's family. Employer was directed to respond to Complainant's interrogatories and request for production of documents by February 28, 2003. In this order, the undersigned repeated his prehearing conference admonition to the parties that they contact each other regarding requests for extensions and similar procedural matters before filing a motion with the undersigned.

On February 14, 2003, Respondent served an amended notice of deposition on Complainant, scheduling Complainant's deposition for March 1, 2003. That same day, Complainant faxed and mailed a letter to the undersigned entitled as "Mr. Howick's: 1. Motion to Correct the Record; 2. Motion for Default Judgment 3. Motion to Quash Notice of Deposition for March 1, 2003 and Reschedule Depositions on March 8, 2003." Complainant's motion to correct the record centered on counsel for Complainant's assertion that he had never been told by counsel for Respondent that counsel for Respondent would be out of the country. Complainant's motion to quash the notice of deposition was founded on Complainant's assertion that the parties had agreed upon March 6, 7, or 8, 2003 as the dates for Complainant's deposition, not March 1, 2003. Complainant, based on his assertion that Respondent failed to timely answer the undersigned's prehearing order, moved for default judgment, adverse inferences and preclusions orders. In response, the undersigned issued an amended order and order on February 21, 2003. The amended order vacated the undersigned's order dated February 14, 2003, and denied Complainant's three requests. The undersigned denied Complainant's two letter requests because

they did not conform with the procedural regulations governing the filing of motions under 29 C.F.R. Part 18. Counsel for both parties were instructed to file individual motions accompanied by distinct memoranda in support of those motions. Furthermore, the parties were apprized "that official and personal considerations such as the initial appearance of counsel, family illnesses and planned vacations or trips will be considered, . . . , as long as such considerations are not abused." The parties were admonished to resolve the outstanding discovery issues between them, including due dates for complete answers to interrogatories and the dates of depositions. On February 25, 2003, settlement proceedings were extended for sixty days. However, Administrative Law Judge Roketenetz issued an order on February 28, 2003 terminating settlement proceedings.

On April 14, 2003, Complainant requested an extension of the trial date and all deadlines in this action due to "family health and financial hardships relating to his having to go back to work today after having taken approximately three months off to assist his ailing aged parents." Complainant asserted that Respondent agreed to the extension, provided that Complaint provided Respondent with a copy of Complainant's OSHA complaint and other OSHA documents. Counsel for Complainant stated that, when Complainant was not working or caring for his parents, he would work on his responses to Respondent's discovery requests. The undersigned issued a second amended scheduling order granting a ninety-day extension of all deadlines. August 1, 2003 was established as the discovery cutoff date, with motions and replies to motions due by August 15, 2002 and August 22, 2002 respectively. The hearing was re-scheduled for September 9 through September 13, 2003 in Dayton, Ohio.

On July 9, 2003, Complainant filed a motion to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Another telephone conference was held between the parties on July 25, 2003. As a result of the telephone conference, a third amended scheduling order was issued. The discovery cutoff date was extended to August 8, 2003, with exceptions allowed for scheduled depositions and requests for individual interviews commencing on August 19, 2003. Additionally, the July 25, 2003 order granted Complainant's request to conduct individual interviews of non-management employees of Respondent, provided that Complainant provide counsel for Respondent with a list of the individuals to be interviewed by August 11, 2003. Respondent was granted an extension of time to file a response to Complainant's motion to amend the complaint to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Complainant submitted a document entitled "Complainant's Motions *In Limine* 1-10" on July 28, 2003. Respondent submitted a response to Complainant's motion to amend complaint on July 31, 2003. The undersigned issued an order denying Complainant's motion to amend his complaint on August 7, 2003, finding that resolution on the merits will not be facilitated by adding Jack Maxwell as an individual respondent and because of the prejudice that Jack Maxwell would suffer from being added at such a late point in the matter, and additionally finding that Complainant's motion to add the TSCA was untimely and that Complainant provided no circumstances to justify the application of the doctrine of equitable tolling. Also on August 7, 2003, Respondent submitted a brief in opposition to Complainant's motion *in limine*.

Counsel for Complainant left a voice-mail message for the undersigned's attorney-advisor, Craig Hoffman, on August 11, 2003, wherein he stated the following:

Hi, this is Ed Slavin, (904) 471-7023. I am calling to advise the Court that my father has died and I have to go back to New Jersey for the funeral. I am the only son, the only child, and my mom is in her mid-eighties. We are going to file a motion for partial summary judgment before I leave for New Jersey. We will mail that to the judge, unless you want it faxed. Mr. Howick will send the exhibits from Dayton direct by mail with a separate notice of filing. We are going to ask for some relief due to my father's death on the deadline for filing any discovery motions. I don't know if we need to. They are evasive, but they don't have any facts either, so we don't need necessarily to file any discovery motions but just to preserve the option. And we are going to want to reschedule the depositions. I will get a letter out of here in a little while, maybe this afternoon. I am working on the obituary right now. Anyway, I just wanted to keep you posted and if Judge Phalen would want the motion for summary judgment faxed so that you can start researching on it, I will be happy to do so, it is going to be a 25-pager, I think. Also, I can email it, if you like and send it in WordPerfect or whatever format. Anyway, thank you now, (904) 471-7023.

On August 12, 2003, Complainant filed a motion for "partial summary judgment on the issues of res judicata and collateral estoppel on the lack of 'just cause' for the firing and the lack of any 'insubordination,' as found by the State of Ohio, and on liability for firing and blacklisting, subject matter jurisdiction, timeliness, temporal nexus, employer-employee, notice and knowledge of protected activity, and creation of a hostile working environment." Counsel for Complainant also requested leave to file further exhibits due to the need to review Respondent's discovery responses and due to the death of counsel's father. The additional exhibits in support of Complainant's motion for partial summary judgment were not received until August 22, 2003. Additionally, upon leave to make further filings, Complainant requested that the undersigned vacate the August 7, 2003 decision and order "on Mr. Maxwell and TSCA." Attached to Complainant's motion for partial summary judgment were motions from Complainant for a protective order regarding his personal and financial information, as well as a motion to alter deadlines for discovery and discovery motions due to the death of counsel's father. The undersigned issued a notice of hearing on August 13, 2003, declaring that a formal hearing was scheduled for September 9 through September 13, 2003 in Dayton, Ohio.

My attorney-advisor, received a telephone call from counsel for Respondent on August 18, 2003. Respondent's counsel asked him if he was aware of whether or not Complainant was going to attend his deposition scheduled for August 19, 2003. Respondent's counsel informed him that he could not reach counsel for Complainant by telephone, and he stated that he could not contact Complainant since Complainant was represented by counsel. My attorney-advisor telephoned counsel for Complainant, but could not leave a message because his answering machine did not have any remaining memory to store a message. He then left a message on the answering machine of Complainant's home telephone, and sent an email to Complainant asking the Complainant to inform the court of whether or not he would appear for his deposition scheduled on August 19, 2003. Complainant replied to the email at 11:47 pm on August 18,

2003. Instead of providing an answer to the question of whether or not he would appear for his scheduled deposition, Complainant discussed his efforts and attempts to send documents to the court in support of his motion for partial summary judgment.

On August 20, 2003, the undersigned issued an order denying Complainant's motion *in limine*, and cautioned Complainant against filing frivolous pleadings, motions, or other papers for an improper purpose or without evidentiary support for factual contentions. Counsel for Complainant left a voicemail message for my attorney-advisor on August 21, 2003. When he returned counsel's phone call, counsel for Complainant informed my attorney-advisor about renumbering Complainant's exhibits in support of his motion for partial summary judgment. Counsel for Complainant also advised my attorney-advisor that he intended to reschedule the depositions sooner rather than later, but indicated that Complainant had recently been diagnosed with hypertension. Counsel for Complainant stated that, if Complainant was unable to travel, then he was going to request that the depositions be conducted in Dayton, Ohio.

The undersigned received exhibits from Complainant in support of his motion for partial summary judgment on August 22, 2003, and again on August 23, 2003. Also on August 22, 2003, Respondent filed a brief in opposition to the motions filed by Complainant on August 12, 2003. Respondent filed a motion to dismiss on August 27, 2003 together with a brief in support of motion to dismiss and a supporting affidavit from counsel for Respondent. Respondent set forth the course that discovery has taken in this matter, concluding with Respondent's claim that he was unsure that Complainant notified him that he would not attend his deposition on August 19, 2003, which was the third time that Complainant's deposition had been scheduled. Respondent then stated that Complainant would not re-schedule the deposition, unless it was a deposition conducted over the telephone. Furthermore, Respondent alleged that it has been prejudiced by presently having been unable to depose Complainant with the hearing scheduled to begin on September 9, 2003. In requesting that the undersigned dismiss Complainant's claim, Respondent recognized that dismissal is a harsh sanction, but argued that it was needed to penalize Complainant for his conduct and to deter others from engaging in similar conduct. Complainant filed a response to Respondent's response to Complainant's motion for partial summary judgment on August 25, 2003, and a response on August 28, 2003 to Respondent's motion to dismiss. Complainant stated that he would appear, along with his counsel, "in Michigan next week for depositions of Mr. Howick and other witnesses." He again relied upon personal reasons to justify his unavailability.

The undersigned conducted a conference call with the parties on August 28, 2003, wherein the undersigned advised the parties of his rulings on all motions presently pending. During the conference call, Complainant represented that he will make himself available in Michigan on September 3, 2003. Additionally, he stated his intent to conduct individual interviews with non-management level employees of Respondent. Respondent objected to Complainant conducting informal interviews because the time period for conducting discovery had passed and because Respondent believed that the list of Respondent's employees who were designated¹ to be informally interviewed by Complainant included almost every non-

¹On August 11, 2003, Complainant addressed a letter to his counsel and attached a list of initial names for non-management interviews, which he also faxed to the undersigned and Respondent. The attached list and

management employee of Respondent. Over Respondent's objection, the undersigned permitted Complainant to conduct no more than the combined sum of ten informal interviews and depositions. Counsel for Respondent agreed to schedule the deposition of Complainant on September 3, 2003, provided that the deposition was conducted in the offices of counsel for Respondent in Detroit, Michigan. Counsel for Complainant vehemently objected to the offices of counsel for Respondent as the situs for the deposition of Complainant.² The undersigned, over Complainant's objection, ruled that the offices of counsel for Respondent in Detroit, Michigan would be the situs for the deposition of Complainant on September 3, 2003.

request for interviews was divided into two columns. Under column A, Complainant listed thirty-one individuals, "all non-management C-E 'warehouse' personnel, all 'commercial drivers' on the OTR tour project, dates specific - 30 days before, and after, all commercial drivers currently employed by the Respondent, all non-management 'security personnel' who staffed the front desk, front door, and any surveillance system the respondent [sic], all 'parking-lot' maintenance and cleaning staff, 30 days before, and after the time frame of the OTR project." Column B included "all respondent's 'vehicle maintenance & cleaning staff' for OTR vehicle, for the specific time frame noted above, all of the respondent's 'night janitorial staff' and cleaning crew people for the specific time frame noted above, specifically, all those names of people who handled trash, and cleaned, C-E offices, more specifically, any and all persons who 'emptied corporate office, and equipment warehouse ash-trays and waste baskets,' any and all people who 'ran and operated' any kind of trash disposal unit, specifically any and all trash compactors, paper shredders, or fire incinerators, under the employment, sub-contract, direction and control of respondent, all 'airport shuttle drivers, and/or airport limo drivers,' transporting OTR crew and/or management, will supplement." At the bottom of the attachment, Complainant stated "Complainant and counsel respectfully request and reserve the right, under the unusual and extraordinary circumstances of Mr. Slavin's father passing to supplement."

²As set forth in footnote 2 to the undersigned's August 29, 2003 order, Counsel for Complainant objected to the deposition being held in the offices of counsel for Respondent on several grounds, which included his representation that Complainant objected to being held prisoner in the twenty-fifth floor of a corporate law firm's offices, that Complainant and his counsel would be required to obtain accommodations that were more expensive in Detroit than in Warren, Michigan, and that Complainant and his counsel would also have to pay to park in downtown Detroit. Additionally, during the conference call, counsel for Complainant argued that the Department of Labor does not adequately protect Whistleblowers because of departmental desuetude. Counsel for Complainant urged the undersigned to provide a reasonable accommodation to himself and Complainant. Counsel for Complainant has frequently cited to *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB September 27, 1996) and referenced the ADA when requesting a reasonable accommodation. Notwithstanding the representations made by counsel for Complainant regarding the ruling in *Seater*, during the August 28, 2003 conference call, the Administrative Review Board on remand in *Seater* simply directed that "the manner in which [a witness who was critically ill]'s testimony is taken on remand must accommodate [the witness'] physical condition at that time. Prior to scheduling of a deposition or a supplemental hearing, Seater must provide medical evidence concerning [the witness'] *current* physical condition and any medically imposed restrictions pertinent to the taking of [the witness'] testimony. Based on the information provided, the ALJ then must issue an appropriate order concerning the conditions under which discovery, if appropriate, will be conducted and [the witness] testimony will be taken." Obviously, the ARB did not order the administrative law judge to make any specific accommodations, rather, based on medical evidence regarding the witness' current physical condition, the administrative law judge was to devise and appropriate accommodation to allow the witness to provide testimony. It is of notable distinction that the ARB's ruling in *Seater* concerned a witness with a critical illness. Here, counsel for Complainant is requesting accommodations for himself and Complainant based on financial concerns. Neither counsel for Complainant nor Complainant himself purport to be suffering from a critical illness. Moreover, Complainant is the one responsible for prosecuting his claim; he is not simply a witness. It is also notable that the ARB in *Seater* declared that reliance on the ADA was misplaced, noting that access for handicapped individuals to Federal agency proceedings is provided for by Section 501 of the Rehabilitation Act of 1973, as amended, 29, U.S.C. § 791.

The undersigned then addressed Respondent's motion to dismiss. Since the motion to dismiss was predicated on the three separate failures of Complainant to attend his scheduled deposition, and in light of Complainant's representations that he would appear in Detroit, Michigan on September 3, 2003 for his deposition, a ruling on Respondent's motion to dismiss was reserved. A final decision on Respondent's motion to dismiss was to be provided at the outset of the hearing, in part based on whether or not Complainant attended his deposition as scheduled. The parties were informed that their prehearing statements were due by September 2, 2003. Counsel for Complainant requested permission to incorporate Complainant's motion for partial summary judgment into the prehearing statement, which was denied by the undersigned. The undersigned informed the parties that the prehearing statement was not to be an argumentative document. Rather, the parties were instructed their prehearing statements should include short, plain statements of the issues, a list of witnesses, and a list of exhibits.

The undersigned issued an order on August 29, 2003, which set forth the rulings communicated to the parties during the August 28, 2003 conference call. The order consisted of the following: order denying Complainant's motion for partial summary judgment; order denying Complainant's motion for leave to file further exhibits/argument; order denying Complainant's motion to vacate the order dated August 7, 2003; order denying Complainant's motion to alter deadlines; order reserving judgment on Complainant's motion for a protective order; order reserving ruling on Respondent's motion to dismiss; pre-trial order; and a fourth amended scheduling order. Complainant's motion for partial summary judgment was denied under 29 C.F.R. § 18.40(d) since Complainant denied Respondent access to information by means of discovery. Allowing Complainant to prevail on a motion for partial summary judgment when he obstructed Respondent's ability to mount a meaningful defense to the motion would violate Respondent's right to procedural due process. Moreover, the undersigned found that the record was replete with genuine issues of material fact. The undersigned reserved ruling on Respondent's motion to dismiss. The undersigned noted that he was considering alternative sanctions to dismissal of his claim as authorized by 29 C.F.R. § 18.6(d), including but not limited to, inferring that the testimony of Complainant would have been adverse to Complainant, ruling that the testimony of Complainant is established to be adverse to Complainant, ruling that Complainant may not rely on his testimony in support of his claim, ruling that Complainant may not object to the introduction and use of secondary evidence to show what Complainant's testimony would have shown should he not appear for his deposition, or render a decision of the proceeding be rendered against Complainant. The undersigned requested that Complainant take note that the undersigned is considering assessing sanctions against Complainant due to his failure to cooperate in the prosecution of his claim and to follow orders of the undersigned Administrative Law Judge.

The pre-trial order provided the parties with further instruction on the content of their prehearing statement, directing that the prehearing statements be prepared according to 29 C.F.R. § 18.7(b) and submitted to the undersigned by September 2, 2003. A prehearing conference call was scheduled for 9:00 am on September 5, 2003. The parties were informed that the formal hearing was to begin at 9:00 am on September 9, 2003. Following the admission of exhibits, which were to be marked, indexed, and exchanged between the parties, each party was informed

that they would be permitted to make a fifteen-minute opening statement confined to offering into evidence and identifying the exhibits that each party intended to rely upon in support of their case.

On September 2, 2003, Respondent faxed a prehearing statement to the undersigned, which complied with 29 C.F.R. § 18.7(b). That same day, Complainant faxed to the undersigned a document entitled “Mark E. Howick’s Motion to Bifurcate Trial and Prehearing Statement.” Complainant first moved to bifurcate the liability phase of trial from the remedies and damages phase of trial.³ Complainant’s prehearing statement identified eight witnesses that Complainant would call, fourteen witnesses Complainant may call, and reserved the right to call rebuttal, impeachment, and other witnesses, including every single one of Respondent’s witnesses in his own case in chief. Complainant’s prehearing statement also contained an updated exhibit list. Beginning on page 8 and continuing to page 22 of Complainant’s prehearing statement, under a heading of evidence overview, Complainant inserted text that was word-for-word the same as his motion for partial summary judgment, except for a few sections that had been expanded. Counsel for Complainant also faxed a letter to the undersigned on September 2, 2003 requesting the issuance of separately enclosed subpoenas for fourteen individuals.

On September 4, 2003, the undersigned’s legal technician, received several phone calls from counsel for Respondent and counsel for Complainant. The parties wanted to speak to the undersigned regarding Complainant’s deposition. Since the undersigned was conducting hearings in Kentucky, the parties agreed to hold a conference call with Mr. Hoffman in order to present him with their concerns. The parties informed my attorney-advisor that Complainant’s deposition had begun on September 3, 2003 as scheduled. The deposition was recessed around 6:00 pm on September 3, 2003. Complainant’s deposition was renewed on the morning of September 4, 2003. At some point that afternoon, Complainant indicated that he could not continue his deposition because he was feeling ill because he had not taken his recently prescribed medication. The parties indicated that they had reached an agreement on how to proceed. The parties indicated to my attorney-advisor that Complainant’s deposition was going to be recessed for the day. The parties were then going to travel to the offices of Respondent where Complainant was going to conduct informal interviews or review documents to be produced by Respondent. Counsel for Respondent agreed to produce a management employee of Respondent for a deposition on the morning of September 5, 2003. Upon the completion of that deposition, the deposition of Complainant was to be concluded. There was a discussion regarding rescheduling the prehearing conference from September 5, 2003 to September 8, 2003. Counsel for Complainant then informed my attorney advisor that he would contact my legal technician about his outstanding subpoena requests. My attorney-advisor informed counsel for Complainant of the undersigned’s procedure for requesting subpoenas. Counsel for Complainant responded that he intended to complete the subpoena forms and indicated that he would like for the undersigned to send the completed subpoena’s to Complainant’s residence in Dayton, Ohio. Following a discussion with the undersigned, my attorney-advisor left messages with counsel for both parties rescheduling the September 5, 2003 prehearing conference to September 8, 2003 to accommodate the parties discovery agreement.

³Complainant’s motion to bifurcate the hearing was submitted after the deadline set by the undersigned for the filing of motions prior to the hearing.

The undersigned received a fax transmission from counsel for Complainant at 4:02 pm on September 5, 2003 that included a subpoena request for documents or objects in the possession of Respondent, as well subpoena requests for thirteen individuals. The parties again requested a conference call with attorney-advisor, since the undersigned was not available. The parties informed my attorney-advisor that the deposition of Craig Conrad, an employee of Respondent, had begun in the morning and concluded around 4:00 pm. Counsel for Respondent was then going to conclude the deposition of Complainant.

During the discussion, counsel for Complainant requested that the undersigned issue an order requiring counsel for Respondent to designate a representative to observe while counsel for Complainant reviewed documents in the possession of Respondent at Respondent's offices on the evening of Friday, September 5, 2003 and on Saturday, September 6, 2003. Counsel for Respondent brought multiple boxes of documents with him to the deposition of Mr. Conrad. It was unclear to my attorney-advisor whether the boxes were given to Complainant, or whether Complainant was simply allowed to inspect the contents of the boxes during Mr. Conrad's deposition. My attorney-advisor then contacted the undersigned, informing the undersigned of Complainant's oral motion. He then communicated to the parties the undersigned's denial of Complainant's motion. The parties were instructed to address any unresolved discovery issues during the prehearing conference scheduled for 9:00 am on September 8, 2003.

At the end of the conference call, counsel for Complainant asked my attorney-advisor if he had received a facsimile from Complainant that was to provide the address for overnight delivery of the Complainant's subpoena requests. My attorney-advisor stated that he had not received such a transmission. Complainant then provided him with the address of a Red Roof Inn hotel in Michigan where he desired to have the subpoenas sent to by overnight mail. With authority granted by the undersigned, Administrative Law Judge Joseph Kane signed the fourteen subpoena requests of Complainant on September 5, 2003. The subpoenas were then prepared and delivered to Federal Express by Office of the Administrative Law Judge staff for overnight delivery.

At 9:47 pm on Sunday, September 7, 2003, counsel for Complainant left a voicemail message for my attorney-advisor. He provided the telephone number where he could be reached for the September 8, 2003 prehearing conference. Counsel for Complainant also stated the following:

We were in Detroit until we checked out of the hotel, I guess around 12:45 p.m. today. The subpoenas never arrived. Mr. Howick had a panic attack, an anxiety attack. At first we thought it was a heart attack. He was in the Emergency Room at Kettering Hospital here in Dayton for several hours, so we would appreciate it if you all could be a little kinder and gentler to Mr. Howick. The judge was just a little bit rough on him the last time I thought, especially that remark about working through the tears, which I have never heard a DOL judge behave that way toward a party before, especially a party who just had an attorney who lost a father, and I have been associated with the Department of Labor, Office of the Administrative Law Judges since I clerked for Judge Rithey and Judge Litt in 1986. And I was quite frankly ashamed that the judge talked that way. But anyway, could you let the judge know that Mr. Howick was hospitalized today and

if he could be a little nicer to him, maybe, we would really appreciate that. Thank you and good night.⁴

The undersigned conducted a prehearing conference call on September 8, 2003. At the outset, counsel for Complainant asked if a court reporter was present to transcribe the conference call. Upon being informed that there was indeed no court reporter, counsel for Complainant requested permission to record the conference call. The undersigned denied Complainant's request, noting that it was not his practice to record prehearing conferences, and it was not required by any provision in 29 C.F.R. § 18.8. Counsel for Complainant stated that they had not received the subpoenas at their hotel over the weekend. The undersigned provided Complainant with the option of picking the subpoenas up from the undersigned's office that day, if not, the undersigned would bring the subpoenas to the hearing. The parties informed the undersigned that the deposition of Complainant had been completed. After being informed of the manner in which discovery was conducted by the parties during the prior week, the undersigned stated that he was considering assessing sanctions against both parties. Complainant was informed that he was dangerously close to having his complaint dismissed. Respondent was warned that the undersigned was considering assessing sanctions related to the discovery process.

During the conference, the undersigned denied Complainant's motion to bifurcate the trial. The undersigned also struck from the record pages 8 through 22 of Complainant's prehearing statement because counsel for Complainant incorporated, expanded upon, and used a substantial portion of Complainant's motion for partial summary judgment in direct violation of the undersigned's prior order rendered during the August 28, 2003 conference call. The parties informed the undersigned that they had not reached an agreement on the order and presentation of witnesses. Counsel for Complainant voiced his intent to call all witnesses listed in his prehearing statement during Complainant's case in chief, as well as all witnesses on Respondent's witness list. Counsel for Respondent requested that the undersigned order Complainant to be called as Complainant's first witness to avoid delay. The undersigned denied Respondent's request. Counsel for Complainant indicated that he could work with counsel for Respondent to reach an agreement by the beginning of the hearing on the order and presentation of witnesses. Respondent designated John Schroeder as its representative. Counsel for Complainant stated that Mr. Schroeder would be his first witness.

At 4:27 pm on September 8, 2003, Respondent faxed to the undersigned a motion to quash subpoena of Louis Bridenstine, brief in support of motion to quash, motion to quash the subpoenas of J.Hadsell, T. Schwartz and G. McClone, and a brief in support of motion to quash. Respondent moved to quash the subpoena of Louis Bridenstine on the grounds that they had not

⁴In the August 28, 2003 prehearing conference, the undersigned admonished counsel for Complainant concerning his failure to notify counsel for Respondent in a timely manner of the death of his father on or about August 11, 2003 and his apparent inability to attend Complainant's deposition on August 19, 2003. Counsel for Complainant apparently misunderstood the undersigned's remark that a professional must sometimes work through their grief to meet their higher level of responsibility. The remark was not directed at Complainant. The undersigned's comments to counsel for Complainant were predicated on counsel for Complainant's apparent failure to effectively notify Respondent regarding the status of the August 19, 2003 deposition. It was not meant to derogate Complainant nor his counsel. In fact, the undersigned and counsel for Respondent expressed sympathy to counsel for Complainant on the death of his father.

been served with a valid subpoena bearing the signature of the Administrative Law Judge and the embossed seal of the Department of Labor, and because the witnesses had not received the witness fee and mileage reimbursement required by law in advance of the date of trial. Respondent moved to quash the subpoenas to J. Hadsell, T. Schwartz, and G. McClone for the same grounds and because all three individuals reside, work and conduct business outside of the state of Ohio and more than 100 miles from the Montgomery County Courthouse where the trial was scheduled.⁵

The formal hearing on this matter began as noticed at 9:00 am on September 9, 2003. Edward Slavin, Esq. appeared on behalf of Complainant and Fred Batten, Esq. appeared on behalf of Respondent. Pursuant to 29 C.F.R. § 18.8, since the prehearing conference occurred within seven days of the hearing, the undersigned elected to make a statement on the record summarizing the actions taken during the prehearing conference. The undersigned stated that there was not a stenographic recording or court reporting of the prehearing conference because it was his practice for them not be recorded, additionally, the undersigned noted that there was no request. The undersigned discussed his questioning of the parties about the status of Complainant's deposition, to which counsel for Respondent stated that it had been completed at around 6:15 pm on September 5, 2003. Counsel for Respondent also verified that six to eight boxes were made available to Complainant for inspection on September 5, 2003, but Complainant was not permitted to keep the documents. Complainant noted for the record that he was only permitted two-hours to inspect what he described as "tons of documents." The undersigned stated at the hearing, on reconsideration of his admonishment of Respondent for not leaving the documents with Complainant, that since the deadline for completion of discovery had long since passed, that Respondent may not have been obligated to make those documents available to Complainant since the documents had previously been made available to Complainant, and that Complainant did not avail himself of the opportunity to inspect the documents. The undersigned stated that Complainant did not diligently work to make himself available for his deposition, unnecessarily delaying the process of discovery through his failure to appear at three previously scheduled depositions.⁶

Interrupting the recitation of the events that occurred during the prehearing conference, the undersigned again informed Complainant that he was withholding an order of dismissal, but cautioned Complainant that sanctions were being considered, and that if the presentation of

⁵These were appropriate motions to quash, and they would have been granted at the hearing had the complaint not been dismissed.

⁶Pursuant to Complainant's and Respondent's representations in telephone conferences and at the hearing, after August 8, 2003, Respondent made available for inspection and copying at its offices in Michigan, the documents and materials Complainant requested. The parties had agreed that Complainant would inspect and copy the documents during the week of August 18, 2003, when Complainant was scheduled to be deposed by Respondent, and when Complainant was going to conduct informal interviews of Respondent's non-management employees. Complainant did not attend his deposition that week, nor did he inspect and copy documents, nor did he conduct informal interviews. The only reason given for Complainant's non-appearance during the week of August 18, 2003, was that the father of Complainant's counsel died on August 11, 2003. However, as previously noted, counsel for Complainant was able to submit a twenty-five page motion for partial summary judgment on August 12, 2003.

Respondent's case was materially affected by Complainant's actions during discovery, that a motion to dismiss would be reconsidered. However, the undersigned that stated, "[n]ow I intend to proceed here this morning with what we have, and I'm going to continue my review of the prehearing conference." The undersigned then proceeded to discuss the admission of exhibits, presentation of witnesses, and the subpoenas that had been requested by Complainant. The parties were then permitted to address issues the undersigned omitted from his recitation of the prehearing conference. Counsel for Complainant took the opportunity to make a plea, under a Fourth Circuit Court of Appeals case 29 C.F.R. § 18.29, to have the undersigned order the Respondent's to bring to the hearing the documents that Complainant requested during discovery that Complainant had been unable to copy and inspect. The undersigned declined to order the production of documents as a sanction against Complainant due to Complainant's material failure to make himself available for deposition. The undersigned stated that any failure on the part of Respondent to produce documents during discovery would be a separate sanctions issue. Complainant's exception to the undersigned's ruling was noted. The undersigned then stated "that the Complainant is in this courtroom proceeding with this case by the skin of his teeth, and now I want to proceed and get to the heart of this matter, and I want no more fooling around with concepts of discovery belatedly here." The undersigned then directed counsel for Respondent to bring whatever documents that had been made available to Complainant to the courthouse. The undersigned then stated that a separate proceeding on the record would be held, after the entire case was heard, on the matter of sanctions related to discovery abuses.

At this point in the hearing, the undersigned said "[l]et's go to the exhibits," and asked Complainant to offer his exhibits. Counsel for Complainant then moved into evidence all of the parties' exhibits, "both Complainant's and Respondent's." Complainant then listed Respondent's exhibit numbers. The undersigned then stated to Complainant, "[t]ell me your exhibits." Counsel for Complainant relied, "Yes, Your Honor. The Complainant's exhibits are numbered." The undersigned asked for an index of Complainant's exhibits, which was provided. Counsel for Complainant stated that Complainant's exhibits were essentially the same as the exhibits that were attached to Complainant's motion for partial summary judgment, except for a correction to a couple of the entries and the addition of exhibit 34. The undersigned then asked Complainant if his exhibits were bound for trial, noting that he had Complainant's exhibits from his motion for partial summary judgment. Counsel for Complainant stated that Complainant was going to supplement the exhibits from his motion for partial summary judgement "with 34 and some of the others and double-check if we could borrow Your Honor's book back tonight?"

The undersigned informed Complainant that he did not understand Complainant's process for offering exhibits, and then asked Complainant is he was asking the undersigned to utilize the summary judgment exhibits as exhibits in this proceeding. Complainant responded, "[y]es," to which Respondent raised an objection. Respondent objected because specific documents had not been identified, asserting that Respondent did not have knowledge of what documents Complainant was actually relying upon.

Counsel for Complainant cited to *Seater v. Southern California Edison* to argue that the undersigned was required to "let everything in." At this point in the hearing, the undersigned stated that he did not like the manner in which the hearing was proceeding, and then asked Complainant whether the parties had "talked for one moment with each other about your exhibits

here today;" counsel for Complainant responded that there had been no discussion among the parties prior to the hearing about exhibits. Complainant then offered into evidence Complainant's exhibits 1 through 25, 27 through 31, and 34, which were all marked for identification. Complainant reserved Complainant's exhibits 26, 32, and 33 for "[t]he ones that are reserved but are not present yet because they don't exist yet." Counsel for Respondent then listed whether or not he had an objection to each of Complainant's exhibits from 1 to 11. Counsel for Respondent then alleged that he did not have copies of Complainant's exhibits from 11(a) onwards. The following exchange then occurred between the undersigned and counsel for the parties:

JUDGE PHALEN: Well, I want you to listen to - you're saying all through 34 - 12 through 34 that you don't have a compiled presentation of those documents?

MR. BATTEN: That's correct.

JUDGE PHALEN: Do I?

MR. SLAVIN: I believe you do, Your Honor. They were served but again, we will have an extra book. We have additional copies here if anyone needs them. They were sent after the summary judgment exhibits in several batches.

MR. BATTEN: Are they marked?

MR. SLAVIN: They should be, yes, and we have new notebooks as well. They should be in the Judge's notebook.

JUDGE PHALEN: Can you-

MR. SLAVIN: I think it's on the corner of the bench, Your Honor, to Your Honor's right at the very corner in the black notebook. Is that it?

JUDGE PHALEN: Well, this goes through 25.

MR. SLAVIN: Okay.

MR. BATTEN: I don't have a copy of any such notebook, nor was I served with anything like that.

MR. SLAVIN: I don't believe Mr. Batten was served with a notebook. I think he was served with several batches of documents.

MR. BATTEN: And I would like to see some kind of a proof of service or something like that because I don't think I have been.

MR. SLAVIN: Mr. Howick has it.

JUDGE PHALEN: Do you have these?

MR. HOWICK: Yes, sir, I do. I just ran out of time. I actually put that book together, sir, and federal expressed it at 9 o'clock in the parking lot. And what I tried to do is send Mr. Batten, with proof of service pages, segment by segment as I followed up as I got to Kinko's and got those copied, and I also have your notebook here but I just haven't had time to assemble it all.

MR. SLAVIN: And just for the record we apologize for an inconvenience, but Mr. Howick had to go Sunday evening to the emergency room due to an anxiety of panic attack that was originally thought to be a heart attack.

JUDGE PHALEN: These were - you have my utmost sympathy - but these were required to be here.

MR. SLAVIN: They're here.

JUDGE PHALEN: They were required to be here before this.

MR. SLAVIN: Right. They were served.⁷

JUDGE PHALEN: We're not supposed to be wrestling with these at the hearing and where are they. Pass out to Mr. Batten and to me whatever documents we're supposed to have in an order that we don't have to be sorting them.

MR. SLAVIN: Yes, sir. I apologize.

MR. SLAVIN: This is a complete book for the Court. May I approach the bench?

JUDGE PHALEN: Yes. Have you got Mr. Batten's?

MR. SLAVIN: He is getting it, Your Honor.

MR. BATTEN: And, Your Honor, I don't know how that can be a complete book because, I mean, one of the books - one of the things that they wanted to introduce is 5(b) or something like that which is 250 pages, and another one is 5(c) which is another 250 pages.

MR. SLAVIN: Your Honor -

JUDGE PHALEN: I think we are going to get -

MR. SLAVIN: we were in depositions and he made a point that he had some objections somehow and somewhere to part of CX 5(a) and CX 5(b). I asked him what pages and he gave me a look. They don't have any specific objections to any portion of CX 5(a) and CX 5(b). Therefore, we would ask the Court -

JUDGE PHALEN: Right now. Right now. Right at this moment I want to see the copies that I have, and I want to see the copies that Mr. Batten is supposed to have. Get them to him.

MR. SLAVIN: Okay.

JUDGE PHALEN: I'll note for the record that Mr. Howick is putting documents together for distribution.⁸

MR. SLAVIN: The documents that were previously served on Mr. Batten, and we're getting him another set.

JUDGE PHALEN: I'm talking about the exhibits for this proceeding as properly marked and exchanged.

MR. SLAVIN: And again we're talking -

⁷Complainant submitted to the undersigned a "Certificate of Service" signed and dated by Complainant on August 18, 2003 certifying that "a true and correct copy of the foregoing was served on the following parties by the designated methods listed below . . ." Complainant added, "[p]lease note Mr. Batten and Mr. Slavin have exhibits, however they [sic] not all are marked. Supplemented List (corrected) and Exhibits will be forwarded to Mr. Batten and all parties of record. Any errors are not intentional and the cause is due to Mr. Slavin not being available due to the death of his father. Thank you." The foregoing that Complainant referred to contained Complainant's motion for partial summary judgment and Complainant's exhibits 1-25. At the bottom of Complainant's certificate, he included the following, "* Respondents have exhibits. (will supplement)[.]"

⁸A delay of several minutes occurred at this time.

JUDGE PHALEN: The fact that they were previously given does not affect me at this moment. What I want is marked documents in my hands and in Mr. Batten's hands, and I don't want to talk about what he may or may not have in the past.

MR. SLAVIN: Would this be a good time for a recess, Your Honor?

JUDGE PHALEN: No. We're going to stay on the record until this is done.

MR. SLAVIN: So is the Court requiring that multiple copies of the exhibits be given to the Respondent?

JUDGE PHALEN: I want - I want organized copies delivered. I would take as a substitute an organized set up to that certain point. I thought I was working with Claimant's exhibits off of the motion for summary of judgment, and then I have been requested to take those. Is that what your request was?

MR. SLAVIN: Yes, and there are also some supplemental exhibits as well.

JUDGE PHALEN: What about Mr. Batten? Get those documents together and give them to him.

MR. SLAVIN: Yes, sir. And again they were previously served on Mr. Batten.

JUDGE PHALEN: All right. I want you to stop talking right now. (Pause.)⁹

MR. SLAVIN: Your Honor, may I make an observation at this point?

JUDGE PHALEN: No. You have a motion?

MR. SLAVIN: A motion to take judicial notice of the fact that during the depositions we asked Mr. Batten to tell us what he did and did not have, and tried to work with him on exhibits as we tried to work with him on the witnesses. We wanted to schedule the witnesses to cause the minimum inconvenience to their managers, and to give them a schedule, and likewise on the exhibits

MR. BATTEN: Is this what you are - go ahead and finish your motion.

MR. SLAVIN: at any rate we ask the Court to take judicial notice that this could have been avoided. We understand the Court being angry.

MR. BATTEN: Is this 5(b)?

MR. SLAVIN: Yes.

MR. BATTEN: Are you sure?

MR. SLAVIN: Yes.

JUDGE PHALEN: It's denied.

MR. SLAVIN: This was the first one, Mr. Batten. That is the first one I federal expressed to your office, and I put a label on your copy of CX 5(a) during the deposition.

⁹This pause lasted for several minutes. During the proceeding, there were several pauses and interruptions from counsel for Complainant, which caused delays in the proceeding.

(Pause.)¹⁰

MR. BATTEN: May I speak, Your Honor, with respect to Exhibits 5(a) and 5(b)?

JUDGE PHALEN: Yes.

MR. BATTEN: Exhibits 5(a) and 5(b) constitute, I believe, the total document production of the Complainant in this case. If the purpose of having trial exhibits is to assist the parties in knowing what documents are going to be discussed with witnesses and which documents are particularly relevant, this does no good at all. This would be similar if I were to say: "Okay. Every Campbell-Ewald document will be marked Exhibit 1." It doesn't - this does not identify to me exhibits that are going to be used at trial. I believe that a party, if they are going to have exhibits, has to introduce each document separately so that we know what we are talking about.

JUDGE PHALEN: What is your response to that, Mr. Slavin?

MR. SLAVIN: Your Honor, they did not object to a single page of CX 5(a) or CX 5(b). The pages are numbered. They have had them for a long time. We asked them if you have any objections to any particular page, or any particular document, we would like to know so that we can take it up and have a stipulation. They did not do so. As a result, they are just objecting for the purpose of objecting. We would, for the record, renew Mr. Howick's motion for partial summary judgment since the predicate has been laid. He has given his deposition, and the Respondent has not disputed any of the contentions in the motion for partial summary judgment, or any of the exhibits in that motion including these two. And we attempted to pierce the filings and the pleadings, and to get the matter before the Court so that we could have just a trial on damages, or just a trial on those issues upon which there was a genuine issue of material fact. The Respondent never identified so much as one genuine one issue.

JUDGE PHALEN: Mr. Slavin, do not argue your motion for summary judgment to me again.

MR. SLAVIN: I wasn't arguing. I was just renewing it.

JUDGE PHALEN: Do not raise it or argue it as you had. You are repeating your motion for summary judgment. I have denied it. I'm not going to entertain it at this time. You are the one that is not prepared here at this hearing.

MR. SLAVIN: We're prepared to examine the first witness.

JUDGE PHALEN: You are not prepared here at this hearing to do what I want done now with the exhibits.

MR. SLAVIN: May we have a short break?

JUDGE PHALEN: Why?

MR. SLAVIN: So that Mr. Howick can finish assembling the extra copy of the exhibits for the Respondent.

JUDGE PHALEN: And how - what do you mean extra copy? It's not an extra copy to me. To me, it is the exhibits that belong to both my bench and to the opposing party.

¹⁰Again, this pause lasted for several minutes.

MR. SLAVIN: Previously served except for CX 34, sir.

JUDGE PHALEN: No, not previously served. I'm not accepting that. You have exchanged documents but they haven't been designated as exhibits.

MR. SLAVIN: They had exhibit labels on them and they were exchanged. I don't understand, Your Honor. I just don't understand.

JUDGE PHALEN: The delay you should understand.

MR. SLAVIN: Your Honor, it seems -

JUDGE PHALEN: We are at a point in this proceeding where we are dealing with the identity and numbering of exhibits that should have been marked and exchanged by the prehearing conference. They weren't.

MR. SLAVIN: They were, Judge.

JUDGE PHALEN: Mr. Batten, did you know what exhibits he had submitted to you?

MR. BATTEN: No, Your Honor. He had filed - he has filed a motion for partial summary judgment where he has designated various documents that had been served in discovery, and I have received in discovery those documents marked 1 through 11 but they were not marked as exhibits when I first received them.

JUDGE PHALEN: As trial exhibits?

MR. BATTEN: That's correct.

JUDGE PHALEN: Were you told they were going to be trial exhibits?

MR. BATTEN: Well, I know now by virtue of the fact in his Prehearing Order that he designated certain documents that he wanted them to be trial exhibits, but I was not served with copies at that time as being the actual trial exhibits that he would introduce.

MR. SLAVIN: Your Honor, I think this is some hair splitting. These were served with exhibit labels. They knew they were trial exhibits. Mr. Howick has the proof of service. They are not denying they received it. If they want another book, Mr. Howick is preparing it right now, but we are prepared

JUDGE PHALEN: What about after 12?

MR. SLAVIN: After 12 in several segments, Mr. Howick, as the exhibits became available, and were prepared served them, and there is proof of service on those.

MR. BATTEN: Let me speak, Your Honor. Number one, Mr. Slavin is counsel. It's not Mr. Howick's duty to be serving documents number one, and number two

MR. SLAVIN: Your Honor, that is none of their business.

JUDGE PHALEN: Stop. I'll address you when it's time. I'm listening to Mr. Batten.

MR. BATTEN: And secondly, I do not believe that I have been served with any exhibits marked after Exhibit 11. I don't believe that I have a copy of Exhibit 11(a), and I don't believe that I have a copy of any other marked exhibit

JUDGE PHALEN: After 12?

MR. BATTEN: Including 12. I don't have 12.

MR. SLAVIN: Then -

JUDGE PHALEN: As an exhibit?

MR. BATTEN: Correct.

MR. SLAVIN: Your Honor, if that were the case, then why during depositions last week on Wednesday, Thursday, Friday, this weekend, yesterday or this morning, did Mr. Batten never tell us in response to our specific question that he lacked any of the exhibits? We asked him: "Do you have everything that is on our prehearing exchange document?" Let me point out, Your Honor, that I was in New Jersey for my father's funeral, and I cannot be in two places at once, and Mr. Howick has the right, and he is the party, and I designated him to serve the exhibits that we identified. The Certificate of Service sheets are here, Your Honor, Mr. Howick's copy, and we can make copies and provide the Court with copies of these documents but they were served.

MR. BATTEN: Just for the record, Your Honor, I would be willing to go back and look at that deposition transcript because I believe

MR. SLAVIN: It wasn't on the record, Your Honor. We did not clutter the record.

MR. BATTEN: Well, I believe that there is something on the record about the -

JUDGE PHALEN: Stop for a moment.

COURT REPORTER: Excuse me, Your Honor. They need to speak one at a time. I'm not picking up Mr. Slavin.

JUDGE PHALEN: One at a time.

MR. BATTEN: I believe that there is something on the record when the question of Exhibit 5(a) came up and I said: "Don't mark it because I was having a problem with a binder which incorporates all kinds of different documents, and saying that that is going to be a trial exhibit." It is not a trial exhibit. These things have facsimiles to OSHA. They have copies of web pages from OSHA. They have all kinds of different things in them.

MR. SLAVIN: And again, I asked Mr. Batten, Your Honor, during the deposition and perhaps he is right. The discussion on 5(a) and (b) might even be in the transcript, and we would be happy to pull it up for Your Honor if you want to see it?

JUDGE PHALEN: Well, I'm looking facially at (b), and these look like a bunch of unrelated documents.

MR. SLAVIN: They're supplemental exhibits, and there has not been any objection to any specific page.

JUDGE PHALEN: Well, there is an objection here today.

MR. SLAVIN: To what page?

JUDGE PHALEN: There is an objection to Exhibits 5(a) and 5(b).

MR. SLAVIN: Well, if there is an objection it needs to be a specific page, Your Honor.

JUDGE PHALEN: I think the objection stands that these are unrelated documents. I just glanced through it. That is an appropriate statement. I hate to do this but I am granting the motion to dismiss for failure to prosecute this matter.

MR. SLAVIN: May we be heard, Your Honor?

JUDGE PHALEN: I will now give you five minutes each to state - Mr. Batten, I want you to state why the matter should not be granted, the motion to dismiss, and Mr. Batten may respond.¹¹

Counsel for Complainant responded as follows:

MR. SLAVIN: Does the Court have any questions before I begin?

JUDGE PHALEN: No.

MR. SLAVIN: May it please the Court Mr. Howick has endeavored to cooperate in discovery and has done so. The record will so reflect. He gave his deposition. He was there from day to day. He did what the Court ordered. He served upon the Respondent and the Court his exhibits. He filed a motion for partial summary judgment which was non disputed. He is prepared to prosecute his case. He has not done anything wrong. The Respondent has not identified anything that Mr. Howick did wrong. The Court has not identified anything that the Respondent has done wrong. The Respondent is hostile toward protected activity. The Court has been hostile toward protected activity.¹² The fact that Mr. Howick and his counsel have criticized OSHA, or the fact that Eugene Scalia, the former Solicitor of Labor, might hate Mr. Howick's counsel, or the fact that OSHA might dislike the fact that Mr. Howick's counsel has criticized DOL, or the fact that Mr. Howick's counsel has raised concerns throughout the land with respect to DOL's desuetude, D-E-S-U-E-T-U-D-E, is not grounds for dismissal. The fact of the matter is that Mr. Howick is here ready and able to prosecute his case notwithstanding his own parents' poor health, notwithstanding the fact that his counsel's father has just died within the past month, and notwithstanding the fact that he didn't even ask for a continuance. No one has asked for a continuance. We are here today. We were denied full and fair discovery. Mr. Howick has not been able to discover, and has not been able to read and learn about the Respondent's accidents during the Olympic torch relay, accidents that were the direct result of truck driver fatigue. In fact, in this case, the evidence is unrefuted and the Court has been invited to commit error.

JUDGE PHALEN: Okay. Arguing the case is out of order.

MR. SLAVIN: What would you like me to say, Your Honor?

JUDGE PHALEN: I'm not here to argue the case. We're solely addressing the motion to dismiss for what I consider to be the material failure of the Claimant to be prepared to present his case.

¹¹ By this point, it was evident to the undersigned that Complainant was not prepared to begin the hearing. Counsel for Respondent stated that he did not have a marked copy of Complainant's exhibits. Meanwhile, in the rear of the courtroom, Complainant was engaged in a process of removing documents from one of four-to-six plastic file drawers, placing an exhibit cover sheet on top, numbering the pages, and passing them to counsel for Complainant.

¹² The undersigned considers this to be an unwarranted personal attack, not only on the undersigned, but also on this Court.

MR. SLAVIN: But he is, Your Honor, and about an hour ago you said you were going to try this case.

JUDGE PHALEN: You know, that's a statement that was already subject to the motion to dismiss that I told you you were really at the brink. You apparently don't believe those things. I told you it was hanging by a thread. Now saying that we're going to proceed is not some kind of a new ruling. It is attempting to get the case on, and

MR. SLAVIN: May I call the first witness?

JUDGE PHALEN: No, you may not. Was your statement may I call the first witness?

MR. SLAVIN: Yes, Judge.

JUDGE PHALEN: The answer is no.

MR. SLAVIN: The Respondent has blocked Mr. Howick's efforts to obtain justice every step of the way from OSHA to OALJ. This is the largest most powerful agency on this planet in a public group which is currently under SEC investigation. It has sandbagged Mr. Howick. It has made discovery abuse positions throughout this case. We have discovery responses that Your Honor hasn't seen yet perhaps, or hasn't had an opportunity to read but basically the case is admitted. We have undisputed evidence, and there is nothing that Mr. Howick did wrong. He gave his deposition. Initially, it was agreed that the deposition was going to be on the 20th of August. He gave his deposition on the 3rd, 4th and 5th of September. He didn't have time to take the 10 depositions or employee interviews that Your Honor ordered he had a right.

JUDGE PHALEN: Okay. Your time is up.

MR. SLAVIN: Thank you, Your Honor. Thank you for your consideration.

Respondent, in his response, alleged that Complainant had failed to produce tapes containing recordings of certain conversations with and messages left by Respondent's witnesses. Complainant was permitted a two-minute time period for rebuttal. Counsel for Complainant, upon being asked during his rebuttal to answer with a "yes" or a "no" by the undersigned to the question of whether Complainant refused to produce the tapes that Respondent requested, stated "[w]e declined. We didn't refuse." Respondent then filed with the undersigned a copy of Complainant's deposition transcript. Complainant then renewed his request to have Respondent bring certain documents to the courtroom, which the undersigned denied since Complainant's claim had been dismissed. Complainant requested a recess, which the undersigned denied. Complainant then asked the undersigned to disclose any communication the undersigned had with Judge John Vittone, Judge Thomas Burke, or Todd Smith, asserting that Judge Vittone's hostility towards protected activity by counsel for Complainant and former Chief Judge Nahum Litt had caused the undersigned to be prejudiced against Complainant. Complainant then requested that the undersigned recuse himself. The undersigned denied those requests. The undersigned then stated:

JUDGE PHALEN: My observation here today is that you are not ready to proceed. You've come in here with documents which were supposed to have been marked as exhibits that were not marked as exhibits. There are stacks of them

over there. Mr. Batten has not been served precisely with what is going to be the exhibit. I have not been. I had to fish in the beginning to see if these were the documents related to the summary judgment motion. In my opinion, you are not prepared. And when I look at this Exhibit 5(a) as being a collection of documents that aren't designated and 5(b), it reinforces my position. If we go through with this hearing, we are going to be sorting out documents ad infinitum, and it is my observation that you are not ready to proceed.

MR. SLAVIN: Motion to -

JUDGE PHALEN: You have not followed the orders of my -- of this Court.

MR. SLAVIN: Motion to continue until 1:00 p.m.

JUDGE PHALEN: Stop interrupting me. Do not interrupt me. I believe that there has been a material failure to participate in the discovery and I stated the reasons why in my order. Nothing has happened since my order to reverse that. I believe also that Respondent has caused a failure to produce documents that stand on their own and for which I intend to issue sanctions and that, however, is a separate matter as I stated at the outset of this hearing from the chain of events that are involved with regard to the failure to produce Mr. Howick for a deposition. This matter by ardent attempts by counsel to get together to do the deposition early on could have been handled.

The undersigned informed Complainant that he had violated the undersigned's prehearing orders regarding preparation for the hearing. The undersigned declared that Complainant was not prepared to prosecute his case in accordance with the undersigned's prehearing orders and directives. The undersigned then invoked Respondent's motion to dismiss, which the undersigned had reserved ruling on for the outset of the trial. The undersigned ruled that Complainant had failed to prosecute his case. The undersigned ordered that Complainant's claim be dismissed for a failure to prosecute.

Additionally, the undersigned provided the parties with thirty-days in which to file briefs responsive to the issue of sanctions to be assessed in response to the discovery abuses that occurred in this matter.

Discussion and Applicable Law

29 C.F.R. § 1978, together with 29 C.F.R. § 18, implements the procedural aspects of the STAA. 29 C.F.R. § 1978.100(a), (b). Formal hearings on STAA complaints are to be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of the Administrative Law Judges promulgated at 29 C.F.R. § 18. 29 C.F.R. § 1978.106(a). The authority of an administrative law judge to conduct a fair and impartial hearing is set forth in 29 C.F.R. § 18.29. Generally, an administrative law judge is authorized to take any action authorized by the Administrative Procedure Act, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, and to do all other things that are necessary to enable the administrative law judge to discharge the duties of the office. 29 C.F.R. § 18.29(a)(6, 8, 9). Specifically enumerated in 29 C.F.R. § 18 are the powers of an administrative law judge, with regard to the motions and requests of parties, when a party or

officer or agent of a party fails to comply with a subpoena or with an order of the administrative law judge. 29 C.F.R. § 18.6(d)(2)). The specifically enumerated powers permit an administrative law judge to:

- (1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;
- (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;
- (3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon the testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
- (4) Rule that the non-complying party may not be heard to object to the introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown; or
- (5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or *that a decision of the proceeding be rendered against the non-complying party*, or both.

29 C.F.R. § 18.6(d)(2)(i-v) (emphasis added). It is evident that an administrative law judge has been granted the authority, where appropriate, to dismiss the complaint of a party who violates the orders of the administrative law judge. Therefore, it is important to determine when it is appropriate to dismiss the complaint of a party for failing to follow the orders of an administrative law judge.

The Administrative Review Board (“ARB”) has affirmed an administrative law judge’s decision to dismiss a complaint for failure to prosecute. *See Bacon v. Con-Way Western Express*, ARB No. 01-058, ALJ No. 2001-STAA-7 (ARB Apr. 30, 2003). Bacon, the complainant, initially refused the administrative law judge’s advice to obtain an attorney and requested a hearing as soon as possible. *Bacon* ARB No. 01-058, p. 2. Prior to going on the record the day of the hearing, Bacon engaged in an almost hour-long diatribe against the respondent and its witnesses. *Id.* At that point, the administrative law judge opened the hearing on the record and asked the parties if there were any preliminary matters to be addressed. *Id.* Bacon requested a continuance so that the administrative law judge could provide an attorney for him. *Id.* Since the administrative law judge had previously informed Bacon that he could not appoint an attorney for him, the administrative law judge attempted to proceed with the hearing. *Id.* Bacon then became disruptive, refused to proceed with his case, and “hurl[ed] invective and verbal abuse” at the administrative law judge and the respondent’s witnesses. *Id.* When Bacon continued his “repeated abusive, belligerent, and irate behavior,” after warnings from the administrative law judge, the administrative law judge adjourned the hearing and summoned United States Marshalls to escort Bacon from the courtroom. *Id.* The administrative law judge issued an order to show cause why Complainant’s claim should not be dismissed. *Id.* Upon receiving a brief from Respondent in support of dismissal and a response from Bacon that the administrative law judge deemed “essentially [an] incomprehensible rant laced with invective against Respondent,” the

administrative law judge issued a recommended decision and order dismissing Bacon's complaint. *Id.*

In beginning their analysis, the ARB referenced their recent holding that "[c]ourt's possess 'inherent power' to dismiss a case for lack of prosecution." *Reid v. Niagara Mohawk Power Corp.*, ARB No. 00-082, ALJ No. 2000-ERA-23 (ARB Aug. 30, 2002), *citing Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). However, the ARB recognized that a dismissal with prejudice is a severe sanction that defeats a litigant's right to access the courts, and that it should be used as a weapon of last resort and reserved for extreme circumstances. *Bacon*, ARB No. 01-058, p. 3. The ARB then identified to the factors that the federal circuit court of appeals, under which Bacon's claim arose, stated should be considered before a dismissal of a case for want of prosecution is warranted. *Id.* at 4. The ARB proceeded to analyze the administrative law judge's decision under those factors. Even though the ARB acknowledged that in many cases dismissed for a lack of prosecution, the failure to prosecute resulted in a delay of months or even years, the ARB affirmed the administrative law judge's decision to dismiss the claim for failure to prosecute, noting that Bacon's totally unacceptable conduct and the absence of the expression of an apology or avowal to conform his conduct to an appropriate standard in the future was an additional factor that tips the balance in favor of dismissal. *Id.* at 4, 5.

Complainant resides in Ohio and Respondent's offices are headquartered in Michigan, both of which fall under the appellate jurisdiction of the Sixth Circuit Court of Appeals. However, Complainant was terminated in Kansas, which is under the Tenth Circuit Court of Appeals. The Sixth Circuit Court of Appeals considers four factors in assessing the appropriateness of a decision to dismiss a complaint for failure to prosecute: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal of the action. *Mulbah v. Detroit Bd. of Educ.* 261 F.3d 586, 589 (6th Cir. 2001) (finding that district court abused its discretion by dismissing suit, and stating that an alternative sanction should have been employed that would have protected the integrity of the pre-trial procedures even though the plaintiff and her counsel could have proceeded in a more timely and professional fashion).¹³ No single factor controls an inquiry into whether a judgment dismissing an action for failure to prosecute was proper; dismissal is permitted "where there is a clear record of delay or contumacious conduct on the part of the plaintiff." *Mulbah*, 261 F.3d at 591. The Sixth Circuit found dismissal to be improper absent notice that dismissal is contemplated or a record showing bad faith. *See Wright v. Coca-Cola Bottling Co. of Memphis*, 41 Fed.Appx. 795 (6th Cir. 2002), *citing Vinci v. Consol. Rail Corp.*, 927 F.2d 287, 287-88 (6th Cir. 1991); *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988).

¹³The Tenth Circuit Court of Appeals employs an identical test when reviewing a district court's decision to dismiss. *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 918 (10th Cir.1992); *see also Gripe v. City of Enid, Okl.*, 312 F.3d 1184, 1188.

The Sixth Circuit has voiced its reluctance to uphold the dismissal of a claim merely to discipline an attorney. See *Coleman v. American Red Cross*, 23 F.3d 1091, 1094 (6th Cir. 1994). In fact, the Sixth Circuit has held that “[d]ismissal is usually inappropriate where the neglect is solely the fault of the attorney.” *Carter v. City of Memphis, Tenn.*, 636 F.2d 159, 161 (6th Cir. 1980). The Sixth Circuit has reversed a dismissal, finding that the sanction was “extremely harsh in that it deprives a plaintiff of his day in court due to the inept actions of his counsel[.]” See *Patterson v. Township of Grand Blanc*, 760 F.2d 686, 688 (6th Cir. 1985) (implicitly finding that any potential claim a plaintiff may have against his inept attorney did not overcome the harm the plaintiff would suffer from dismissing the action). The United States Supreme Court has not been as reluctant to enforce a the dismissal of a plaintiff’s complaint for the failures of his attorney. In *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Court upheld the district court's inherent power to dismiss an action with prejudice when the plaintiff's attorney, who had a history of dilatory conduct, missed a pretrial conference without an adequate excuse. *Gripe*, 312 F.3d at 1189, citing *Link*, 370 U.S. at 633, 634. In *Link*, Justice Harlan wrote:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Id. at 1189, citing *Link* at 633-34, 82 S.Ct. 1386 (internal quotation marks omitted). The Tenth Circuit in *Gripe* noted that the footnote from the above-quoted passage in *Link* explains:

Clients have been held to be bound by their counsels' inaction in cases in which the inferences of conscious acquiescence have been less supportable than they are here, and when the consequences have been more serious. Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition.

Id. at 634 n. 10, 82 S.Ct. 1386 (citations omitted).

Despite recognizing dismissal of a claim for failure to prosecute as a harsh sanction, the Sixth Circuit also recognizes competing concerns that should guide a court considering a motion to dismiss. Specifically, the Sixth Circuit has identified the court's need to manage its docket, the public's interest in expeditious resolution of litigation, and the risk of prejudice to a defendant because the plaintiff has failed to actively pursue its claim. *Little v. Youter*, 984 F.2d 160, 162 (6th Cir. 1993). The Secretary, preserving the integrity and ethical manner in which administrative hearings are to be conducted, has upheld a dismissal of a complaint where the complainant failed to accept certified mail, had not responded to several orders issued by an administrative law judge, and had not responded to telephone communications. *See Cohen v. Roberts Express*, 1991-STAA-29 (Sec'y Feb. 11, 1992). The Secretary has also affirmed an administrative law judge's recommended dismissal of a complaint where the complainant did not comply with discovery and pre-trial orders. *See White v. "Q" Trucking Co.*, 93-STAA-28 (Sec'y Dec. 2, 1994).

The case law makes it clear - since dismissal of a complaint is such a harsh sanction that denies a party's right to access the courts, it is only appropriate as a matter of last resort in response to a party's record of delay or contumacious conduct. The federal appellate courts prefer that dismissal be used to discipline an attorney, but rather to preserve the integrity of the court and to prevent prejudice to the opposing party, even though the Supreme Court's holding in *Link* remains valid law.

The record of delay and malfeasance of Complainant and his counsel warrants the dismissal of Complainant's claim. Complainant's deposition, which was originally noticed to begin on January 29, 2003, was not finally completed until September 5, 2003; four days before the hearing was to begin. The hearing, which was originally scheduled to begin on April 29, 2003, was rescheduled to begin on June 10, 2003, and then again rescheduled to begin on September 9, 2003. Complainant, while acting *pro se*, agreed to answer Respondent's interrogatories and requests for production of documents by February 24, 2003. Following several extensions of time based on Complainant's personal reasons, Complainant finally provided Respondent with answers to interrogatories and request for production of documents over six months later on August 8, 2003. Counsel for Complainant notified the undersigned on August 11, 2003 that his father had died, adding that he was "going to want to reschedule the depositions." Between August 11, 2003 and August 18, 2003, neither Complainant nor his counsel was able to effectively communicate to Respondent that Complainant was not going to appear for his deposition on August 19, 2003, and the deposition was only able to be rescheduled for September 3, 2003 by intervention of the undersigned on August 28, 2003. In fact, in response to the undersigned's attorney-advisor's question as to whether he intended to appear for his deposition, Complainant ignored the question, and instead chose to discuss his efforts to file exhibits with the undersigned in support of his motion for partial summary judgment.

When Complainant finally appeared for his deposition, he needed a recess during the afternoon of the second day of his deposition because he was feeling ill due to his failure to take his prescription medication. In addition to the delay Complainant caused by failing to take his prescription medication, Complainant and his counsel "declined to" produce tapes that Respondent had requested. In addition, upon review of volume one of Complainant's deposition, it is apparent that he delayed the completion of the deposition by providing lengthy responses.

Counsel for both parties acknowledged to the undersigned's attorney-advisor that Complainant's lengthy answers were the reason for the length of the deposition.

Leading up to the hearing, counsel for Complainant repeatedly violated the undersigned's orders, including filing frivolous motions¹⁴, filing letters instead of motions with separate supporting memoranda, and by blatantly incorporating Complainant's motion for summary judgment into Complainant's prehearing statement. Additionally, Complainant requested fourteen subpoenas just after 4:00 pm on Friday, September 5, 2003, even though Complainant had been aware of all thirteen individuals who were subpoenaed and had listed such individuals on his prehearing statement that was filed with the undersigned on September 2, 2003. Despite the undersigned's order to the parties to have trial exhibits marked, indexed, and exchanged, Complainant appeared at the hearing without having exchanged marked and indexed copies of Complainant's exhibits.

As a result of the dilatory conduct of Complainant and his counsel, Respondent's was materially prejudiced: Respondent's procedural due process rights to mount a meaningful defense were compromised. Complainant, by delaying his deposition for over seven months and not finally concluding his deposition until 6:15 pm on Friday, September 5, 2003, with the hearing set to begin on September 9, 2003, contributed to and therefore prevented Respondent from mounting a meaningful defense. Because of the time at which Complainant's deposition was finally completed, Respondent was prevented from developing or pursuing any evidence that may have arisen out of Complainant's deposition.

Complainant was first warned that the undersigned was considering dismissing his complaint during a telephone conference on August 28, 2003. The undersigned's admonishments were memorialized in an order dated August 29, 2003, wherein the undersigned reserved ruling on Respondent's motion to dismiss until the hearing, based in part on Complainant's attendance at and cooperation in completing his deposition. At the prehearing conference on September 8, 2003, the undersigned informed Complainant that he was dangerously close to having his claim dismissed. Complainant was again warned at the hearing that the undersigned would consider Respondent's motion to dismiss if the undersigned determined that Respondent was materially prejudiced by Complainant's delay in appearing for his deposition.

¹⁴There are several examples of frivolous motions filed by Complainant that wasted the time and resources of the undersigned and his staff. The most obvious example was "Complainant's Motion In Limine 1-10". At the end of the motion, Complainant stated "[t]hese motions should not be necessary but have the effect of restating reasonable expectations of probity applicable to administrative hearings." The ten items Complainant sought to preclude from admission into evidence were actually ten actions that Complainant presumptively sought to bar Respondent from engaging in, despite the absence of any indicia that Respondent had or would engage in such activity. Earlier in the proceedings, Complainant filed motions entitled, "Motion for a Protective Order for Simultaneous Exchange of Discovery Responses," "Motion to Correct the Record," and a "Motion for Default Judgment" seeking adverse inferences and preclusion orders based on Complainant's assertion that Respondent failed to answer the undersigned's prehearing order. In addition to frivolous motions, Complainant repeatedly submitted documents entitled "Complainant's Notice of Filing of Correspondence," attached to which were letters from Complainant's counsel to counsel for Respondent.

Beyond warning Complainant that his failure to cooperate could lead to dismissal, the undersigned also informed Complainant that he was considering the imposition of less drastic sanctions. The undersigned specifically identified the sanctions enumerated at 29 C.F.R. § 18.6(d) as sanctions that were being considered to remedy the prejudice Respondent suffered as a result of Complainant's delay in appearing for his deposition. Although the undersigned had already granted two continuances of the hearing, Complainant did not request a continuance of the September 9, 2003 hearing until after the undersigned dismissed his claim. By reserving ruling on Respondent's motion to dismiss, the undersigned afforded Complainant a second chance at having his claim heard on the merits. At the hearing, the undersigned clearly expressed his intent to have this matter proceed to a full and fair hearing, urging Complainant to cease arguing over discovery matters and to offer his exhibits into evidence.

The undersigned did not dismiss Complainant's claim solely to discipline Edward Slavin, Esq. Complainant initially appeared *pro se*. He participated in all conference calls. However, for the last three or four conference calls, the undersigned had to order Complainant, who was represented by counsel, not to speak unless the undersigned asked him a question, due to the frequency of Complainant's previous interruptions. The undersigned reserved ruling on Respondent's motion to dismiss, predicated a final ruling on Complainant's attendance at and cooperation with the taking of his deposition on September 3, 2003. Even after Edward Slavin, Esq. appeared on his behalf, Complainant continued to maintain an active role. Complainant acted as a quasi-secretary and co-counsel to his counsel. For instance, Complainant assumed the responsibility for notifying Respondent that he would appear for the deposition scheduled for August 19, 2003. Respondent who apparently was not made aware that Complainant would not attend his deposition, contacted the undersigned's attorney-advisor to see if he could ascertain whether or not Complainant would attend his deposition on August 19, 2003. The undersigned's attorney-advisor asked Complainant whether he was going to attend through an email and a message left on Complainant's home answering machine. Complainant responded by email, but failed to answer whether or not he would attend. He chose, instead, to inform the undersigned's attorney advisor of the personal challenges he faced in submitting documents to the undersigned and his sympathy for the family of his counsel. Complainant's personal inconveniences, health, and misfortune were repeatedly raised to excuse his attendance at properly noticed depositions, timely completion of answers to Respondent's interrogatories and request for production of documents, and for numerous extensions of time. Complainant's failure to take prescription medication resulted in the continuance of the second day of his deposition. Complainant blamed his lack of preparedness at the hearing on a panic attack he suffered on September 7, 2003 that allegedly required Complainant to be at a hospital for several hours. Complainant maintained an active role throughout the proceeding, and his personal reasons were the primary source of delay throughout the proceeding. The undersigned finds that Complainant demonstrated a reckless disregard for the effect of his conduct on this proceeding. His conduct thwarted Respondent's ability to mount a meaningful defense.

Despite the undersigned's admonishment, Complainant and his counsel continued the same pattern of behavior during the hearing. When asked to offer Complainant's exhibits into evidence, counsel for Complainant continued his dilatory behavior by offering into evidence Respondent's exhibits. The undersigned pressed Complainant to identify the exhibits he intended to introduce, yet counsel for Complainant was evasive. It quickly became clear to the

undersigned that Complainant did not have a bound set of marked exhibits to provide to the undersigned and Respondent. In fact, Complainant himself was in the back of the courtroom organizing documents into exhibits. The list of Complainant's exhibits provided to the undersigned at the hearing identified 34 exhibits, while the book of exhibits provided to the undersigned at the hearing only contained exhibits up to 5C.

It is worthy of mentioning at this point that Complainant did not ever request that the hearing date of September 9, 2003 be rescheduled. Complainant represented that he would be ready to proceed on September 9, 2003. However, when the time arrived, Complainant was not prepared to begin. As usual, Complainant blamed his unpreparedness on a combination of personal reasons and Respondent's tactics. The undersigned viewed Complainant's lack of preparedness to begin the hearing coupled with his failure to request a continuance to be the quintessential straw that broke the camel's back. While any one action of Complainant and his counsel independently might not have warranted dismissal as a sanction, the overall effect of the dilatory and contemptuous behavior of Complainant and his counsel materially prejudiced Respondent's ability to mount a meaningful defense to Complainant's allegations, wasted the time and resources of the Office of the Administrative Law Judges, and offended traditional notions of fair play and substantial justice. The actions of Complainant and his chosen counsel led to congestion of the undersigned's calendar. The undersigned finds that the behavior of Complainant and his counsel warrants a dismissal for failure to prosecute, notwithstanding any failure of Respondent to provide discovery documents to Complainant in a timely and meaningful manner. Respondent's actions or inactions related to discoverable evidence in this matter will be addressed by the undersigned following the submission of briefs on the subject from the parties.

On or about 3:30 pm on September 17, 2003, while the present Recommended Decision and Order - Dismissal of Complaint was being prepared for filing, Complainant filed the following: (1) a letter entitled "COMPLAINANT MR. MARK E. HOWICK'S REQUEST FOR SUBPOENAS, MOTION TO ORDER *IN CAMERA* REVIEW AND IMPOUND DOCUMENTS, MOTION FOR LEAVE OF COURT TO FILE MOTION TO RECONSIDER SEPTEMBER 9, 2003 ORDER DISMISSING FOR "FAILURE TO PROSECUTE", AND COMPLAINANT'S SUGGESTION OF *SUA SPONTE* JUDICIAL RECUSAL."; (2) COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT AGAINST CAMPBELL-EWALD; (3) DECLARATION OF MARK E. HOWICK; (4) A suggested order of default judgment to be entered against Respondent; and (5) two subpoenas *duces tecum* requesting that Complainant be permitted to inspect and copy "[a]ll discover production documents requested by Mr. Howick, all microfilm, paper/electronic documents bearing his name and all privilege logs." The foregoing five documents were filed prematurely and have not evaluated by the undersigned before issuing this present Recommended Decision and Order - Dismissal of Complaint. Complainant may re-file the remaining documents in response to the present order, file new documents responsive to the present order, or avail himself of any action to which he is legally entitled.

Again, the undersigned stresses that his decision to dismiss Complainant's claim was not based on any one action or inaction. Rather, after considering the totality of the circumstances leading up to the hearing in conjunction with Complainant's lack of preparedness at the hearing, the undersigned determined at the hearing that dismissal was the appropriate sanction.

Complainant was well aware of the fact that the undersigned was considering imposing sanctions against him. Complainant and his counsel were both culpable. The undersigned does not believe that an alternative sanction, such as ruling that Complainant is precluded from relying upon his own testimony, would adequately remedy the situation created by Complainant and his counsel. Not only did Complainant forestall the taking of his deposition, he essentially precluded Respondent from pursuing any discoverable evidence that arose out of his deposition, most notably the recordings of conversations and voicemail messages that Complainant made but did not produce. Therefore,

IT IS RECOMMENDED that Mark E. Howick's complaint be dismissed.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE: This Recommended Order of Dismissal and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 29 C.F.R. §§ 1978.109(a); 61 Fed. Reg. 19978 (1996). Pursuant to 29 C.F.R. § 1978.109(c)(2), the parties may file with the Administrative Review Board briefs in support of or opposition to the above-signed's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule.